

**KANSAS DEPARTMENT OF HEALTH OF ENVIRONMENT
DIVISION OF ENVIRONMENT
BUREAU OF ENVIRONMENTAL REMEDIATION
REMEDIAL SECTION**

REGULATORY IMPACT STATEMENT

Pursuant to the requirements of K.S.A. 1994 Supp. 77-416, as amended by
L. 1995, Ch. 93, Sec. 5 and Ch. 171, Sec.2

I. Economic Impact Statement

and

II. Environmental Benefit Statement

PROPOSED NEW REGULATIONS:

K.A.R. 28-73-1 THROUGH K.A.R. 28-73-7
December 1, 2004

I. ECONOMIC IMPACT STATEMENT

K.A.R. 28-73-1 through K.A.R. 28-73-7

I. Summary of Proposed Regulation, Including Its Purpose.

K.A.R. 28-73-1 through 28-73-7 are proposed new regulations to be adopted in response to K.S.A 65-1,221 et.seq., other wise known as the Environmental Use Control Act (henceforth called the “Act”).

The purpose of the Act is to provide a voluntary mechanism to assist existing state programs to address environmental contamination in a cost effective manner that is protective of human health and the environment.

The purpose of the regulations is to implement the Act and describe the procedures to allow a property owner to voluntarily restrict the use of the subject property in order to mitigate risk posed by environmental contamination that exceeds department standards for unrestricted “residential” use, which remains on the property after appropriate assessment and/or remedial activities. The Act and these regulations are entirely voluntary, meaning that public and private entities intentionally elect to participate in the Environmental Use Control Program. Entities who elect to participate will be subjected to the Act and these regulations. An environmental use control runs with the land and is binding on all successors in interest to the property; however, an environmental use control can and shall be removed if the property owner demonstrates to the department’s satisfaction that the original risk to human health or the environment, which created the need for the control, is no longer present.

The statute does exclude properties including certain solid wasted disposal areas which are issued permits pursuant to K.S.A. 65-3407, and amendments thereto, or which have received authorization from the secretary for unpermitted disposal pursuant to K.S.A. 65-3407c, and amendments thereto, and confined feeding facilities as defined in K.S.A. 65-171d, and amendments thereto.

A regulation development committee consisting of various stakeholders was established to assist KDHE in the development of the regulations for the Environmental Use Control Program. The committee members included representatives from the following: the Natural Resources Council, Kansas Chamber of Commerce, Burlington Northern and Santa Fe Railway Company, Oil and Gas interests, U.S. Army Corps. Of Engineers, Kansas Agricultural Remediation Board/Kansas Retailers Association, Western Resources (utility company), and Reiss Remediation/Koch Industry.

II. Reason or Reasons the Proposed Regulation is Required Including Whether or Not the Regulation Is Mandated by Federal Law.

These regulations are required by the statute K.S.A. 65-1,232, which state, “The secretary shall adopt rules and regulations to implement the provisions of this act”. The proposed regulations implement the Act and provide a means for property owners to voluntarily restrict the future use of the property rather than performing a more thorough remediation for unrestricted use. The

federal laws provide for stringent requirements for addressing contaminated sites that pose a risk to human health and the environment. The Act and these regulations provide a mechanism for property owners to implement a more cost-effective remediation based on the future use of the land, which is protective of human health and the environment. The proposed regulations are not mandated by federal law.

III. Description of costs to agencies, to the general public and to persons who are affected by or are subject to, the regulations.

a) Anticipated Economic Impact upon the Kansas Department of Health and Environment.

The Act creates an Environmental Use Control Program within the Agency. At this time, KDHE will utilize existing positions (1 FTE and ½ unclassified) to implement and run the program. Anticipated expenses include field equipment and supplies, office equipment and supplies, and associated travel expenditures. Costs for office supplies, equipment, training are off-set by funding through a federal grant.

The funding source for the program is based on a one-time fee payment for each property with an approved environmental use control, to be paid by the original applicant, or a long term care agreement between the department and the applicant. The fee requirements for the property to which an environmental use control is applied will be based on classification as a category 1,2, or 3 property. Category determinations for a subject property are based on a variety of factors prescribed by the statute including: the size of the property, the toxicity and mobility of the contaminants, the required frequency of site inspections, anticipated inspection costs, and future maintenance requirements. The statute sets the fee structure, which will range from a one-time payment of \$2,000 to \$10,000 dollars for the life of the environmental use control for category 1 and 2 properties, or a long term care agreement for category 3 properties. The fees will be used to process environmental use control applications, allow inspections of subject properties to ensure they are being used only for purposes permitted by the Environmental Use Control, for developing and maintaining an Environmental Use Control tracking system, and for making the data in the tracking system available to the public.

	<u>FY 2005</u>	<u>FY 2006</u>
Kansas Department of Health and Environment		
Salaries and Wages for 1.5 FTE	8,250	74,206
Other (supplies, equipment, travel)	250	3,000
Contract Services (Laboratory and Project Management)	1,000	8,000
Total	9,500	85,206

b) Anticipated Economic Impact upon other governmental agencies.

KDHE does not anticipate a negative economic impact on other governmental agencies. Local governmental agencies may see a positive economic impact. Remediation will be streamlined on properties slated for future industrial use since they will be eligible for environmental use controls. This would potentially be beneficial for economic redevelopment and could result in an increased tax base for the community. Documenting and tracking properties with environmental use controls will help protect government entities interested in acquiring property by making those entities aware of environmental conditions and restrictions on property use prior to acquisition.

c) Anticipated Economic Impact on private citizens or businesses.

KDHE does not anticipate a negative economic impact on private citizens or businesses. Private citizens or businesses may see a positive economic impact. Allowing companies to remediate to concentrations suitable for the intended future use of the property rather than for unrestricted use may encourage remediation and redevelopment of impacted properties, which in turn may result in an increased tax base for the community and promote the creation of jobs. Tracking properties with environmental use controls help protect parties interested in purchasing or redeveloping a property by making sure the interested party is aware of the environmental condition and restrictions on property use prior to purchasing.

d) Anticipated Economic Impact to persons who are affected by, or are subject to, the regulations.

Entities who are affected by, or are subject to, the Act and the regulations have voluntarily elected to participate in the program. Affected entities would have a pre-existing responsibility to investigate and/or remediate contaminated property. For eligible parties, the Act and regulations would provide a beneficial economic impact by allowing property owners to voluntarily restrict the future use of the property which would allow adoption of clean-up standards protective of human health and the environment for the actual future use of the property, rather than meeting more stringent clean-up standards for unrestricted future use. The use of environmental use controls is a cost effective way of managing risk for many contaminated properties across the state of Kansas. In cases where the party responsible for the contamination is not the property owner, the property owner could potentially be compensated for restrictions they voluntarily agree to place on their property.

In general, the fee required for placing an environmental use control on property will be significantly less than the cost of the additional remediation required to return the property to unrestricted use. For category 1 or 2 sites, the applicant will be required to pay a one time fee of \$2,000 to \$10,000 dollars. Category 3 sites will require a long-term care agreement between the applicant and the agency that will include re-imbursement of agency costs. The associated costs will be directly related to the oversight and mandatory tracking of the property-specific environmental use control. It is extremely difficult to project the actual cost-savings that will be realized by implementing an environmental use control due to the highly variable nature of property-specific factors such as: type of contamination, size of property, actual media impacted, extent of contamination, remedial methodology selected, etc.

e) Costs which would likely accrue if the proposed regulations are not adopted, the persons who will bear the costs and those who will be affected by the failure to adopt the regulations.

If the proposed regulations are not adopted, the citizens, businesses and other governmental entities would not have a reliable mechanism for insuring that restrictions placed on property usage due to environmental risk are enforced and remain in place until the risk is no longer present. This could allow individuals or governmental entities to acquire contaminated or restricted-use property without prior knowledge of the environmental conditions. Without these regulations, KDHE would require remediation of contaminants to concentrations based on risk for unrestricted property use. This would potentially have a negative economic impact on property owners who could otherwise restrict the intended future use of their property and conduct a less expensive remediation. Failure to adopt these regulations could increase remediation costs for property intended for industrial or commercial use, which could ultimately increase the cost of redevelopment.

f) Description of any less costly or less intrusive methods that were considered by the agency and why such methods were rejected in favor of the proposed regulations.

The statute is structured in such a way as to provide very little latitude to the agency in the drafting of these regulations. No less intrusive or less costly methods were considered by KDHE because these methods would not achieve the purposes of the statute.

g) Consultation with the League of Kansas Municipalities, Kansas Association of Counties, and Kansas Association of School Boards.

The department does not anticipate the proposed regulations will have any fiscal impact on these organizations unless members of these organizations elect to participate in the program.

II. Environmental Benefit Statement

K.A.R. 28-73-1 through K.A.R. 28-73-7

I. Need for proposed regulations and environmental benefit likely to accrue.

Need

K.S.A. 65-1,221 et seq. established the Environmental Use Control Act. These regulations are being created to implement this Act and to set out the procedures for property owners to voluntarily establish restrictions for the future use of their land in order to mitigate risk from exposure to environmental contamination. These regulations are not mandated by federal law.

Environmental Benefit

The Environmental Use Control Program will enhance the protection of human health and the environment while encouraging the redevelopment of impacted properties across the state.

The Environmental Use Control Program will provide the mechanism for tracking and enforcing deed restrictions voluntarily placed on environmentally contaminated property. The department anticipates that long-term benefits for the State of Kansas would include: 1) increased protection of human health and the environment through tracking and enforcement of land use restrictions; 2) increased selection of more affordable remedies based on actual future land use; 3) redevelopment and beneficial reuse of previously contaminated property for industrial and commercial use, and 4) restoration of economic vitality in Kansas communities.

II. When applicable, a summary of the research indicating the level of risk to the public health or the environment being removed or controlled by the proposed rules and regulations.

These regulations provide a mechanism for the department and property owners to mitigate risk from environmental contamination by voluntarily restricting the future use of impacted property. There are many impacted properties across Kansas where remediation to unrestricted use “residential” standards is impractical due to the magnitude of contaminated soils present and/or associated costs. The risk from impacted properties can be dramatically decreased or removed through the use of engineering controls and appropriate deed restrictions to prevent/limit exposure to residual contamination at these properties. The Environmental Use Control regulations protect the public by providing a means to ensure that actual land use complies with any restrictions placed on the deed. Excavation restrictions or excavation notices on subject properties will help prevent unacceptable exposure to construction and utility workers. Restrictions can protect landowners by limiting certain activities on property with an engineering control (i.e., capping) by prohibiting activities that could damage the engineering control and require additional remedial action. Environmental use controls will help protect prospective purchasers, developers, and local government entities by making those parties aware of the environmental conditions and restrictions prior to acquiring the property.

Implementation of a remedial action which may include the use of environmental use controls will meet or exceed federal risk levels as defined by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and reauthorization Act of 1986, Sections 105 and 121.

III. If specific contaminants are to be controlled by the proposed rules and regulations, a description indicating the level at which the contaminants are considered harmful according to available research.

Existing federal standards and guidelines are applicable to address the level of risk to human health and the environment at contaminated sites. The federal National Oil and Hazardous Substances Pollution Contingency Plan (NCP) Section 300.430 (e)(2)(i)(A)(2) states, *“For known or suspected carcinogens, acceptable exposure levels are generally concentrations that represent an excess upper bound lifetime cancer risk to an individual of between 1 in 10,000 and 1 in 1,000,000 using information on the relationship between dose and response. The 1 in 1,000,000 risk level shall be used as the point of departure for determining remediation goals for alternatives when Appropriate, Relevant, and Applicable Requirements (ARARS) are not available or are not sufficiently protective because of the presence of multiple contaminants at a site or multiple pathways of exposure.”* Section 300.430 (e)(5)(D) states, *“In cases involving multiple contaminants or pathways where attainment of chemical-specific ARARS will result in cumulative risk in excess of 1 in 10,000, criteria in paragraph (e)(2)(I)(A) of this section may also be considered when determining the cleanup level to be attained.”*

The *Risk-Based Standards for Kansas (RSK) Manual* is a state guidance document developed by the agency which describes the process for establishing chemical-specific and site-specific cleanup goals for soil and ground water that are protective of human health and the environment. The standards were calculated and are based on existing state regulation Kansas Administrative Regulation (K.A.R.) 28-71-11. In addition, the procedures and methodologies contained in the RSK Manual are consistent with federal guidance and directives. The agency believes that proper employment of the RSK Manual will result in risk-based remediation that is consistent with the federally promulgated standards, state regulations, and is protective of human health and the environment as defined above.

The RSK Manual contains cleanup goals for soil and ground water for both unrestricted use “residential” and non-residential scenarios. Cleanup goals for compounds not included in the RSK Manual are established based on the federal guidelines. The RSK Manual and appropriate current and future land use scenarios are utilized to determine property-specific clean-up goals. At the property owner’s request, environmental use controls will be applied to property when environmental contamination, which exceeds department standards for unrestricted use, remains on the property following the appropriate assessment and /or remedial activities.